IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964.

No. [redacted] 13

WALKER PROCESS EQUIPMENT, INC.,
Petitioner,

vs.

FOOD MACHINERY AND CHEMICAL CORPORATION,
Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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FOOD MACHINERY AND CHEMICAL CORPORATION,
Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Seventh Circuit entered on July 15, 1964.

OPINIONS BELOW

The opinions of the District Court for the Northern District of Illinois (Def. App. 61, 71),* are not reported. The opinion of the Court of Appeals for the Seventh Circuit printed in Appendix A, is reported at 335 F. 2d 315; 142 USPQ 192.

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* All such record citations are to the Appendix to Appellant's Brief filed with the Court of Appeals for the Seventh Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 15, 1964 (Appendix B). A petition for rehearing was denied on August 14, 1964 (Appendix C). Jurisdiction of this Court is invoked under Title 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED

Only questions of law are here presented, the first two arising by dismissal of a pleading* on motion for failure to state a claim on which relief can be granted:

1. Whether it is possible for a person injured in his business by a fraudulently secured patent monopoly on an unpatentable product to have a private claim for damages, the fraud comprising concealing from the Patent Office, and denynig under oath, the facts of the patentee's own invalidating prior sales and use.

2. Whether a monopoly based on a fraudulently procured patent is exempted and shielded from the clearly expressed prohibitions of Section 2 of the Sherman Act by the mere existence of the patent which is the fraudulent instrument of monopoly.

3. Whether a patent infringement action, wherein it is established by the defendant that the patent in suit was obtained by the concealment and false denial by the patent owner of its own invalidating sales and use form the Patent Office and in which action the patent owner attempts to conceal the facts of its conduct, is not an "exceptional case" within the provisions of Title 35 US Code, Section 285.

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* The pleading is a counterclaim filed by defendant-petitioner in a patent infringement suit. The complaint stands dismissed *with* prejudice on plaintiff-respondent's own motion before trial. Thus, the District Court did not have the benefit of trial exposure to the proofs which established all allegations of the counterclaim save that of damage.

STATUTES HERE INVOLVED

Sherman Act, Section 2 (15 U.S. Code 2):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act, Section 4 (15 U.S. Code 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

United States Patent Code, Sec. 285 (35 U.S. Code 285):

"The Court in exceptional cases may award reasonable attorney fees to the prevailing party."

Patent Code In Effect In 1942 (Rev. Stat. 4886; 35 U.S. Code 31, found in 3rd Vol., 35 USCA, p. 817):

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or de-

scribed in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

STATEMENT OF THE CASE

Petitioner, Walker Process Equipment, Inc. (Walker), and respondent, Food Machinery and Chemical Corporation (FMC), are competitors in the sale of equipment used in sewage treatment plants for the treatment of sewage.

On June 24, 1960, FMC brought suit in the Northern District of Illinois for the alleged infringement of United States Patent No. 2,328,655 on knee-action swing diffusers (Def. App. 8). The patent had issued to FMC on September 7, 1943 on the application it had filed in the name of its employee Lannert (Def. App. 15). When the suit was filed, the Lannert patent monopoly was due to expire in two and one-half months. FMC had had virtually no competition in the sale of equipment under the patent throughout the life of the patent (Def. App. 54).

Four years before the infringement action was filed, Walker asked FMC to investigate a rumor that FMC had made public use of the subject matter of the Lannert patent more than a year before filing application for patent. FMC denied any duty to investigate (Def. App. 17, 67).

After the infringement action was brought, FMC attempted to conceal the facts showing its fraud from the Court and from Walker. Walker submitted interrogatories inquiring as to the dates of first shipment and installation and testing of equipment covered by the patent.

The answer as to shipment was "between December 6, 1940 and February 19, 1941", thus bracketing the critical date of February 2, 1941 (Def. App. p. 14). The answer as to date of first testing was "about February 28, 1941" (Def. App. p. 14).

FMC has admitted that the documents showing the actual specific dates were in the office of its counsel where the answers were prepared (Def. App. 31). It seems apparent that such documents were the only source of the evasive answers. Asked informally for more exact answers, FMC stated the dates were as specific as possible and that they could not be more specific "at this time" (Def. App. 29). But when the documents were eventually produced, the specific dates were readily apparent; shipment and installation in December of 1940, and first testing was at least as early as January 20 (Def. App. 26).

The evasion continued with respect to questions seeking to confirm interpretation of the documents and to establish related facts. FMC's manager of digestion equipment (Forrest), who swore to false or grossly evasive answers thereto, defended himself on oral deposition taken by Walker on the ground that his oath was limited to the "best of my knowledge" (Def. App. 49). He admitted that his knowledge was "very, very slim" (Def. App. 50); that he had not been asked the extent of his knowledge when the answers were prepared and that he had not sought the facts from an FMC employee who did have knowledge (Def. App. 49-50).

After these facts had been established by Walker, FMC moved to dismiss its patent infringement complaint, with prejudice (Def. App. 59). Walker moved for an allowance of its attorney's fees (Def. App. 55). This was denied on the ground that the case was not an unusual case. After Walker's first amended counterclaim setting forth the facts uncovered had been dismissed for prolixity,

Walker amended (Def. App. 66-69) to set forth such facts more briefly and alleged that FMC had:

> "15. * * * illegally monopolized interstate and foreign commerce by fraudulently* and in bad faith obtaining and maintaining against the public and this defendant its patent in suit No. 2,328,655, well knowing it had no basis for and had forfeited any rights it might have had to a patent * * *"

It was also alleged that FMC:

> "20. * * * has used its patent to restrict and impede competition in interstate and foreign commerce, in the sale of equipment not covered by the patent in suit (thereby monopolizing trade in said commerce)."

The counterclaim further alleged (Para. 21) that FMC's actions in so obtaining and maintaining the Lannert patent had deprived Walker of profitable business it would otherwise have had, that the effects of such acts continued beyond the expiration of the Lannert patent; and set forth (para. 22) specific orders for equipment that Walker had lost because of the patent and the profits lost thereon.

Paragraph 23 of the counterclaim alleged that FMC:

> "* * * was unjustly enriched by its operations under said patent at Defendant's (Walker's) expense * * *"

On motion of FMC, the second amended counterclaim was dismissed with prejudice and without leave to amend, the District Court indicating that its decision was based on its view that there was a lack of legal basis for the claim for relief, rather than pleading deficiencies that could be cured by further amendment (Def. App. 76).

The principal basis for the District Court's holding that a claim for relief was not stated, was that it "lacked jurisdiction" to determine FMC's alleged fraud on the Patent Office other than in a suit by the United States to

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* The fraud is spelled out in more detail in counterclaim paragraph 17 (Def. App. 67).

cancel the patent (Def. App. 76). The Court of Appeals for the Seventh Circuit affirmed. It held that while, under this Court's decisions in *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machine Co.*, 324 U.S. 806 and *Hazel-Atlas Co.* v. *Hartford Empire Co.*, 322 U.S. 238, "fraud on the Patent Office may bar recovery by a patentee in an infringement action," neither of those decisions, nor that of this Court in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661, "decided, or hinted that fraud on the Patent Office may be turned to use in an original affirmative action, instead of as an equitable defense." (Appendix A p. 3a)

This petition for the writ of certiorari seeks a review of the judgment of the Court of Appeals based on that decision.

REASONS FOR GRANTING THE WRIT

1. Without action by this Court, patents may be procured by an applicant's fraudulent representations to the Patent Office, and the illegal monopoly thus obtained asserted against the public with impunity. The public importance of this consideration pervades the whole of this petition.

The Court of Appeals below has determined that fraud practiced on the Patent Office gives rise to no affirmative action for relief for one damaged by the illegal monopoly. This holding appears to be in direct conflict with the applicable decision of this court in *Shawkee Mfg. Co.* v. *Hartford Co.*, (1944), 322 U.S. 271.*

Shawkee is a companion case to *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, (1944), 322 U. S. 238. In *Shawkee*, this Court stated the basis for relief granted in the *Hazel-Atlas*

* The alternative possibility that the Court of Appeals found this case inapposite, for reasons it did not point out, would present an equally compelling alternative reason for review which is discussed in Reason 2.

case to be (322 U.S. 272) "• • • Hartford's proven frauds in connection with obtaining and enforcing • • •" Hartford's patent.

The sole difference between the *Hazel-Atlas* and *Shawkee* cases was that, in the latter, the Court of Appeals, in affirming a judgment of infringement against Shawkee, had not relied upon the spurious Clark article, but relied on its earlier opinion affirming a similar decree aganst Hazel-Atlas wherein that article was quoted. This Court directed that Shawkee be granted the same relief as granted Hazel-Atlas, i.e., relief from the judgment of infringement.

In *Shawkee,* it was further prayed (322 U.S. 273-4):

> "• • • that a master be appointed by the Circuit Court of Appeals to render an accounting of costs incurred in these and former proceedings, moneys paid by them to Hartford pursuant to the challenged judgments, and damages sustained by them because of Hartford's unlawful use of its patent. • • •"

This Court did not hold that such relief is barred because of the issuance of the fraudulently obtained patent or because only the United States can sue to cancel an issued patent. To the contrary, this Court held in *Shawkee* that (P. 247):

> "• • • Whether this type of relief will be granted must depend upon further proceedings in the District Court which entered the judgment of infringement."

and directed the Court of Appeals to (p. 274):

> "• • • permit Shawkee and the others to bring such further proceedings as may be appropriate in accordance with their prayer for relief."

In the case at bar, the counterclaim under consideration alleges and charges respondent with "fraudulently, and in bad faith obtaining and maintaining against the

public and this defendant its patent in suit * * *" (Def. App. 66) (para. 15). The Court of Appeals held that the counterclaim "failed to state a claim upon which relief could be granted" (Appendix A p. 3a).

Subsequent proceedings in the *Shawkee* litigation (*Hartford Co.* v. *Shawkee Mfg. Co.*, 3 Cir., 1947, 163 F.2d 474) do not indicate the theory upon which additional relief was granted to Shawkee, but do disclose the granting of affirmative relief. If this petitioner is entitled to relief under any theory of law, the Court of Appeals erred in affirming dismissal of the counterclaim for failure to state a claim upon which relief could be granted. *Conley* v. *Gibson*, 355 U.S. 41, 47-48. The decision below is in direct conflict with this Court's decision in *Shawkee*.

2. In the view of the Court of Appeals below, the questions here presented have not been settled by the Supreme Court. The opinion of the Court of Appeals reveals that the basis of its decision was the negative factor of the absence, in that Court's view, of precedent in this Court's opinions for a holding that fraud on the Patent Office could be the basis for affirmative relief for one damaged as a consequence thereof. Assuming the Court of Appeals to be correct, despite the decisions of this Court in *Shawkee** and in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, (1944), 320 U.S. 661 and the enactment by Congress of the explicit prohibitions of Section 2 of the Sherman Act, this petition presents for decision an important question of Federal law, which has not been, but should be, settled by this Court.

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* Not mentioned in the opinion of the Court of Appeals, though its absence, despite presentation thereof in Petitioner's briefs, was called to the Court's attention in the Petition for Rehearing.

The issue of the integrity of the patent system and the public interest therein cannot be more succinctly presented than it was by this Court in *Precision Co.* v. *Automotive Co.*, (1944), 324 U.S. 806, 818, as follows:

> "• • • Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. Cf. *Crites, Inc.* v. *Prudential Co.*, 322 U.S. 408, 415. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.' *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., supra*, 246."

The opinion below holds that one damaged as a result of deception and fraud practiced on the Patent Office has no remedy. The effect is that one who has succeeded in such practices and thereby obtained a patent is shielded by that grant from the reach of the anti-trust laws or any other law which would grant redress to an injured party.

3. In holding that the counterclaim did not state a claim for relief under the anti-trust laws the Court of Appeals referred to a concession by petitioner that, under the decision in *Mowry* v. *Whitney*, (1871), 81 U.S. (14 Wall.) 434, only the Government may annul or set aside a patent. A non-sequitor, that therefore the Courts lack any other jurisdiction as to fraudulent patents, was the basis for the District Court's opinion affirmed by the Court

of Appeals. This was denying the anti-trust counterclaim because the patent law gave no remedy, ignoring the anti-trust law, and this is in violation of this Court's contrary holding in *Mercoid Corp.* v. *Minneapolis Honeywell Corp.* (1944), 320 U.S. 680, 684.

Judging it under the anti-trust laws, the counterclaim clearly states a claim for relief under Section 2 of the Sherman Act. If an attempt to secure a monopoly on an *unpatented* product *by use of a patent* may be illegal under the anti-trust laws, it would seem at least logical that an attempt to secure a monopoly on an *unpatentable* product *by use of fraud* would also be illegal under those laws.

The concurring opinion of Mr. Justice White in *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 200, regards the existence of a patent as no impediment to application of the prohibitions of Section 1 of the Sherman Act. The same reasoning must equally apply where the violation charged is of the provisions of Section 2. The counterclaim herein alleges that respondent fraudulently and in bad faith obtained a patent and maintained it against the public and the petitioner, to petitioner's damage. That charge makes out a claim for relief. By the very act of seeking a patent on what respondent, by its sales more than one year before application made unpatentable, respondent sought to monopolize that part of commerce represented by the patent coverage. The patent itself was the monopoly. The monopoly represented by a patent is legal only if the patent laws are used in good faith. If fraudulently procured, the patent cannot render protection from the anti-trust laws to the monopoly it represents. Such a monopoly is illegal, and within the purview of the anti-trust laws.

4. The importance of a decision on the questions here presented is demonstrated by two recent and additional decisions of the Court of Appeals for the Seventh Circuit each involving fraud on the Patent Office: *Aerosol Research Company* v. *Scovill Manufacturing Co.*, 7 Cir., 1964,

334 F.2d 751, 756 and *Locklin* v. *Switzer Brothers, Inc.*, 7 Cir., 1964, 335 F.2d 331. A petition for the writ of certiorari in the latter case is presently before this Court (*Locklin* v. *Switzer Brothers, Inc.*, No. 581).

From those cases, the case at bar and those previously before this Court, the practice of fraud on the Patent Office, or at least the charge thereof, is not of infrequent occurrence. If the Court of Appeals in the case at bar is correct in its view that the only deterrent heretofore recognized by this Court is the possibility of cancellation proceedings brought by the Government, it is apparent that that deterrent has not been successful. Moreover, such proceedings are at best ineffective since the danger of detection is slight and, when detected, the fraud-feasor retains his spoils thus gained up to the moment of cancellation. The person sustaining actual damage by the monopoly thus fraudulently obtained is in the untenable position of being wronged but having no remedy. The only hope of real deterrence from such practices is by the subjection of the fraud-feasor to the penalties prescribed by the anti-trust laws. The very fact that such practice is by clear terms within the anti-trust laws compels their application.

5. The question of whether an infringement action brought on a patent procured by fraud is an "exceptional" case within the meaning of Title 35 U.S.C., Section 285 permitting the allowance of attorney's fees to the prevailing party in patent litigation has not been passed on by this Court. If the holding of the Court below directed to that issue is permitted to stand, an unintended effect might be interpretation of it as condoning fraud. This alone compels action by this Court.

The Court of Appeals below had the question of an award of attorney's fees before it in a previous case, *Armour & Co.* v. *Wilson & Co.*, 7 Cir., 1960, 274 F.2d 143. Therein it set aside findings of the District Court of fraud practiced on the Patent Office* on the ground that they were not established by the requisite degree of proof. The District Court's award of attorney's fees was reversed.

Relying on that authority, the District Court in the instant case (Def. App. 63) refused to award attorney's fees even though the record before it contanied the admission of FMC that the equipment of one claim was "sold, delivered and installed in aeration tanks by January 1, 1941" (Def. App. 30-31), which information was withheld and concealed from the Patent Office.

Even if the District Court's conclusion, contrary to clear fact, were to be accepted, as it was by the Court of Appeals below, there would still be a conflict of law as compared to Pennsylvania, where the law is stated in *Stock Equipment* v. *Beaumont Birch Co.*, ... F.Supp. ....., 1963, E.D. Pa., 140 USPQ 134, 137, as follows:

> "But whether Stock's Patent Office activities were motivated by a deliberate desire to deceive, or are assessed in a more charitable light, is not too important. Whatever be the true reason, it is fair to conclude that the 150 patent would not have issued if the Patent Office had been apprised of defendant's earlier valve. Even though Stock be given the benefit of the doubt, the fact remains that the trouble and expense which defendant has been put to in defending the present suit has been the result of Stock's

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* Findings of fact that fraud had been committed on the Patent Office, made by another judge of the District Court for the Northern District of Illinois, were also set aside by the Court of Appeals below in its more recent decision in *Aerosol Research Company* v. *Scovill Manufacturing Co.*, 7 Cir., 1964, 334 F.2d 751, 756 (See p. 11 above).

inexcusable conduct in his patent prosecution. Under the circumstances it is grossly unjust that defendant should bear the burden of the litigation. The case is an exceptional one within the purview of 35 U.S.C. Sec. 285. Equity requires that plaintiff pay reasonable attorneys fees to defendant. They will be awarded in an amount to be determined after the judgment entered hereon becomes final."

If the correct standard as to what is an "exceptional case" is even near that of the Pennsylvania District Court, (indeed, unless the whole history here is "ordinary") it becomes apparent that the court below applied the wrong standard. This is not a matter of discretion, because the courts below did not reach the point of discretion, but found the case not exceptional.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 14466 September Term, 1963 April Session, 1964

Food Machinery and Chemical Corporation,
Plaintiff-Appellee,
v.
Walker Process Equipment, Inc.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 15, 1964

Before Castle, Kiley and Swygert, *Circuit Judges.*

Kiley, *Circuit Judge.* The questions before us are whether the district court erred in striking, for failure to state a claim upon which relief could be granted, Rule 12(b)(6), Fed. R. Civ. P., the second amended counterclaim of Walker Process Equipment, Inc., which alleges that Food Machinery and Chemical Corporation violated the federal anti-trust laws by maintaining and enforcing a patent which was obtained through fraud upon the Patent Office; and whether the district court abused its discretion in refusing to award Walker attorney fees after dismissing, with prejudice, Food Machinery's infringement suit on the latter's motion. We think the court did not err in either ruling.

The second amended counterclaim alleged that Food Machinery "illegally monopolized interstate and foreign commerce by fraudulently * * * obtaining and maintaining" Lannert patent No. 2,328,655. The fraud alleged was that Food Machinery had knowingly made a false statement under oath to the Patent Office when it filed the patent application and stated that it "does not know and does not believe the same [the invention claimed in the application] was * * * in public use or on sale in the United States for more than one year prior to this application;" when it knew that more than one year prior to its application it had sold and installed equipment containing the combination claimed in the patent; and that the acts complained of deprived Walker of profitable business it would otherwise have had, listing several specific orders it lost because of the patent in suit. Walker requested an award of treble damages, punitive damages, costs, attorney fees and expenses.

The court, in an oral opinion, found that Walker was attempting to use the issue of fraud to do indirectly what it could not do directly, *i.e.*, procure a cancellation of the patent in suit; and concluded no claim was stated upon which it could grant relief.

Walker's suit is based on the theory that since it is illegal under the anti-trust laws to extend the protection of a legally issued patent to obtain a monopoly on an unpatented product, *Mercoid Corp.* v. *Mid-Continent Investment Corp.*, 320 U.S. 661 (1944), it should be illegal to secure a monopoly on an unpatentable product by use of a fraudulently obtained patent. Walker candidly admits it "knows of no anti-trust case which has involved the exact violation of the anti-trust laws" alleged in its counterclaim. It concedes that under *Mowry* v. *Whitney*, 81 U.S. (14 Wall.) 434 (1871), only the government may "annul or set aside" a patent, but it contends this is not such a proceeding, asserting that "an attack on the validity of a patent," such as here, is totally dissimilar from "an attempt to cancel a patent." It claims that since fraud on the Patent Office can be determined as a matter of defense without violating the concept that only the United States can bring a suit to cancel a patent, *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945), it must follow that determination of

such fraud in an anti-trust action is not barred because of that concept. However, besides offering an analogy to the cases involving patent misuse, Walker offers no other support of its claim.

Although patent misuse may be the basis of an independent anti-trust action, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1944), Walker shows us no case in which the issue of fraud on the Patent Office was used affirmatively in an anti-trust action. And although fraud on the Patent Office may bar recovery by a patentee in an infringement action, *Precision Instrument Mfg. Co.* v. *Automatic Maintenance Mach. Co.*, 324 U.S. 806 (1945), *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), fraud may not be the basis of having a patent declared invalid in a declaratory judgment action. *E. W. Bliss Co.* v. *Cold Metal Process Co.*, 102 F.2d 105 (6th Cir. 1939), *I.C.E. Corp.* v. *Armco Steel Corp.*, 201 F.Supp. 411 (S.D.N.Y. 1961). Neither *Hazel-Atlas*, nor *Precision*, nor *Mercoid* decided, or hinted that fraud on the Patent Office may be turned to use in an original affirmative action, instead of as an equitable defense.

Since Walker admits that its anti-trust theory depends on its ability to prove fraud on the Patent Office, it follows that the district court was correct in deciding that Walker's second amended counterclaim failed to state a claim upon which relief could be granted.

The district court analyzed Walker's case and the applicable law when ruling on Walker's motion for fees. This analysis obviates the idea of arbitrariness. And we are further of the opinion that the record would not warrant a finding that this is an "exceptional" case. 35 U.S.C. §285.[1] *Aerosol Research Co.* v. *Scovill Mfg. Co.* .... F.2d .... (7th Cir., No. 14251, decided June 3, 1964).

For the reasons given, the order disallowing the fees, and the judgment on the counterclaim are affirmed.

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[1] 35 U.S.C. §285 provides that "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois
Wednesday, July 15, 1964

Before

Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

FOOD MACHINERY AND CHEMICAL CORPORATION,
Plaintiff-Appellee,
No. 14466 vs.
WALKER PROCESS EQUIPMENT, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order disallowing the fees, and the judgment of the said District Court on the counterclaim, in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois, 60610
Friday, August 14, 1964

Before

Hon. Latham Castle
Hon. Roger J. Kiley
Hon. Luther M. Swygert

FOOD MACHINERY AND CHEMICAL CORPORATION,
Plaintiff-Appellee,
No. 14466 vs.
WALKER PROCESS EQUIPMENT, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Hereby Ordered by the Court that the petition for rehearing of this cause be, and the same is hereby, DENIED.